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7 **UNITED STATES DISTRICT COURT**  
8 **WESTERN DISTRICT OF WASHINGTON**  
9  
10 **AT TACOMA**

11 **SHANNA ALLERS-PETRUS,** ) Case No. C08-5533 FDB  
12 )  
13 Plaintiff, ) **RESPONSE TO DEFENDANT'S**  
14 ) **MOTION FOR SUMMARY**  
15 ) **JUDGMENT**  
16 )  
17 )  
18 **COLUMBIA RECOVERY GROUP,**  
19 **LLC** )  
20 )  
21 Defendant. )

22 **I. INTRODUCTION.**

23 Defendant moves for summary judgment under Rule 56, arguing Plaintiff  
24 is judicially *estopped* from pursuing claims which not listed in her Bankruptcy  
25 ("Defendant's Motion"). Defendant's Motion fails for the reasons stated herein  
26 and should be denied.  
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## II. DISCUSSION OF FACTS.

With one very important exception, Plaintiff concurs with Defendant's recitation of "undisputed facts" in Paragraph II of Defendant's Motion. However, Plaintiff disagrees with Defendant's final sentence of Paragraph II wherein it writes "[n]owhere in her [Plaintiff's] schedule of assets does she list an FDCPA claim or any other cause of action." This is no longer the case, as discussed in more detail in §III,A, *infra*.

Further, on February 18, 2009, Plaintiff's firm sent an email to Defendant's counsel which included proof of the bankruptcy amendments. *See* Plaintiff's Exhibit B. The email requested that Defendant's motion be withdrawn due to the filing of the amendments. Plaintiff's counsel did not receive the courtesy of a response to this request.

## III. ARGUMENT AND LEGAL AUTHORITY.

### A. Subsequent Amendments to Plaintiff's Bankruptcy Schedules Moot Defendant's Motion.

First, the Court should note that Defendant's motion has been mooted by actions taken by the Plaintiff subsequent to the filing of the motion. Defendant's arguments depended entirely on Plaintiff's failure to list her FDCPA claim in her bankruptcy schedules. *See* Defendant's Motion, page 2. On February 6, 2009,

1 however, Plaintiff's bankruptcy attorney amended Plaintiff's bankruptcy  
2 schedules to include her FDCPA claim and to add a line indicating that the  
3 proceeds of her claim are exempt from creditors. *See* Plaintiff's Exhibit A. This  
4 event mooted Defendant's Motion because Plaintiff's position *vis-à-vis* the  
5 bankruptcy court is no longer inconsistent with the position being taken in this  
6 Court, and therefore the factual basis for a claim for judicial *estoppel* no longer  
7 exists. Because Defendant's judicial *estoppel* argument was the sole basis of its  
8 motion, the motion should be denied on this basis alone.

12 **B. *Estoppel* Doesn't Apply Even if the Motion is not Moot.**

14 Assuming, *arguendo* Plaintiff's original omission (now nullified by her  
15 recent amendments) from her bankruptcy schedules of her FDCPA claim could  
16 conceivably form part of the basis for the application of judicial *estoppel* to  
17 prevent Plaintiff from asserting her FDCPA claim, said legal principle is not  
18 appropriate here. Specifically, Defendant argues that its motion should be granted  
19 because Plaintiff is judicially *estopped* from bringing the claim before this Court,  
20 having failed to previously disclose the existence of her claim when listing her  
21 "assets" as required by the Bankruptcy Court pursuant to her Chapter 13  
22 bankruptcy filing. Relevant legal authorities on this topic, however, do not  
23 support the application of the doctrine of judicial *estoppel* to the facts of this case.

1       The doctrine of judicial *estoppel* is an equitable doctrine a court may  
2       invoke to protect the integrity of the judicial process, and was developed to  
3       prevent litigants from “playing fast and loose” with the courts by taking one  
4       position, gaining advantage from that position, then seeking a second advantage  
5       by later taking an incompatible position. *United Nat. Ins. Co. v. Spectrum*  
6       *Worldwide, Inc.*, 2009 WL 224520, p. 5 (C.A.9 2009). “The circumstances under  
7       which judicial *estoppel* may appropriately be invoked are probably not reducible  
8       to any general formulation of principle.” *New Hampshire v. Maine*, 532 U.S.  
9       742, 749-751, 121 S.Ct. 1808, 1814-1816 (2001), *citing Allen v. Zurich Ins. Co.*,  
10       667 F.2d 1162, 1166 (C.A.4 1982). However, there are several factors which  
11       typically inform the decision to apply the doctrine or not in a particular case. *Id.*,  
12       *citing several sources.* First, a party's later position must be “clearly  
13       inconsistent” with its earlier position. *Id.* Second, courts regularly inquire  
14       whether the party has succeeded in persuading a court to accept that party's earlier  
15       position, so that judicial acceptance of an inconsistent position in a later  
16       proceeding would create “the perception that either the first or the second court  
17       was misled.” *Id.* A third consideration is whether the party seeking to assert an  
18       inconsistent position would derive an unfair advantage or impose an unfair  
19       detriment on the opposing party if *estoppel* is not found. *Id.*

1 Of the three judicial *estoppel* principles enunciated by the *New Hampshire*  
2 *v. Maine* Court and listed above, two weigh heavily against applying judicial  
3 *estoppel* to these facts.  
4

5 The first principle, that the later statement must be “clearly inconsistent”  
6 with the earlier statement, does not apply here. As discussed in §III A, Plaintiff  
7 amended her bankruptcy schedules to reflect her FDCPA claim, and thus there is  
8 no longer a statement or position taken with the bankruptcy court in conflict with  
9 her position with this court. To the extent such a contrary statement or position  
10 did exist before, it has since been nullified and made moot by the recent  
11 amendments made by Plaintiff to her bankruptcy schedules.  
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15 As to the second principle, Plaintiff has not “succeeded” in persuading the  
16 bankruptcy court of her earlier position. This is because her Chapter 13  
17 Bankruptcy was and remains an open case. As will be discussed in greater detail  
18 in the next section, bankruptcy debtors and creditors alike are liberally permitted,  
19 while a bankruptcy case remains open, to amend their statements and schedules.  
20 Moreover, Plaintiff has recently amended her Bankruptcy schedules to reflect the  
21 existence of her claim, which leads one to question which “statement” was  
22 actually made in her bankruptcy proceeding. It is most equitable to choose the  
23 later statement because it would presumably be the more accurate of the two.  
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1 The third principle militates most clearly against the application of judicial  
2 *estoppel*. Plaintiff has amended her bankruptcy petition to add her claim and such  
3 claim is exempt from creditors. Therefore, Defendant is not prejudiced in the  
4 least by the inadvertent failure of Plaintiff to list the claim in Bankruptcy. Now  
5 that Plaintiff has amended her bankruptcy schedules, Defendant has every  
6 opportunity to take advantage of the disclosure by taking appropriate action in  
7 bankruptcy court.

8 Even if Plaintiff had not amended her bankruptcy schedules, Defendant  
9 still could not have been prejudiced by the failure to list her claim as an asset  
10 because Defendant had actual notice of Plaintiff's claim, having been served  
11 notice of the lawsuit after receiving notice of the bankruptcy petition. While the  
12 inadvertent failure to list the claim in her original Bankruptcy Schedules was  
13 clearly inconsistent with the later filing of this claim, Defendant knew about both  
14 and had ample opportunity to take action to take action in Bankruptcy Court to  
15 prevent any negative ramifications of Plaintiff's failure to report the claim.

16 Finally, no advantage was gained by not reporting the debt because  
17 Plaintiff's attorney has listed the proceeds of the claim as "exempt," meaning that  
18 neither Defendant nor any other creditor has any interest in the proceeds of the  
19 lawsuit. *See Exhibit A.*

### C. The Cases Cited in Defendant's Motion are Distinguishable.<sup>1</sup>

Defendant cited two non-binding cases in support of its statement that

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<sup>1</sup> Many courts have taken a bankruptcy-specific approach to applying the judicial-*estoppel* doctrine, and have established patterns for using the unique procedural aspects of bankruptcy to inform their reasoning.

Of these bankruptcy-specific considerations, two are most relevant to the case-at-bar. First, several courts have recognized that statements made in a bankruptcy case that has not yet been discharged are not "previous statements" as that term is understood in the context of judicial *estoppel*, even if it is a chapter 13 plan and the plan has been confirmed. See, e.g., *In re Foreman*, 378 B.R. 717 (Bankr. S.D. Ga. 2007); *Haslett v. Planck*, 140 Wash. App. 660, 166 P.3d 866 (Div. 3 2007); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 11 Wage & Hour Cas. 2d (BNA) 777 (8th Cir. 2006). Second, several courts have found that the existence of an inconsistency between a previous bankruptcy statement and a later claim or statement can be cured by amending the previous bankruptcy statement, as has been accomplished by the Plaintiff here. See, e.g., *Alloy Metal Wire Works, Inc. v. Congress Financial Corp.*, 95 B.R. 340 (E.D. Pa. 1989); *Lampl v. Smith*, 169 B.R. 432 (D. Colo. 1994); *Johnson v. Trust Co. Bank*, 223 Ga. App. 650, 478 S.E.2d 629 (1996); *Clark v. Perino*, 235 Ga. App. 444, 509 S.E.2d 707 (1998).

A typical case involving the amendment of a bankruptcy statement and its effect on judicial *estoppel* arguments is *Clark v. Perino*. *Clark*, 235 Ga. App. 444 (1998). In *Clark*, the Plaintiff had filed a chapter 7 bankruptcy and had failed to include a claim in tort arising from a car accident. *Id.* However, prior to her filing of the claim before the court in *Clark* she had amended her chapter 7 to include the tort claim. *Id.* Defendant argued Plaintiff should be estopped from filing a tort claim against Defendant because Plaintiff had initially filed her chapter 7 Bankruptcy without disclosing the claim. *Id.* However, the court held that *because* she had amended her claim before filing the claim at issue in that proceeding, she was allowed to proceed. *Id.*

A typical case involving statements made in pre-discharge or non-discharged chapter 13 bankruptcy petitions and the "non-final" nature of such statements is *Stallings v. Hussman*. *Stallings*, 447 F.3d 1041 (C.A.8 2006). In *Stallings*, the debtor had filed a chapter 13 but had not obtained a discharge because the case had been dismissed. *Id.* Because the chapter 13 had not reached the discharge stage, the court held that the Bankruptcy Court had not "accepted" the earlier statement and therefore it would not be appropriate to prevent the former debtor from making an inconsistent claim. *Id.*

Plaintiff's bankruptcy petition was filed and her chapter 13 plan was confirmed prior to the filing of the case-at-bar. However, Defendant's bankruptcy case remained open at the time of filing and had not been discharged. Therefore, Plaintiff's statement had not yet been fully accepted by the bankruptcy court and was subject to change as in *Stallings*. As in *Clark*,  
Response to Defendant's Motion for Summary Judgment - 7

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1 “[j]udicial *estoppel* prevents a party from pursuing a claim which she had an  
2 obligation to disclose in bankruptcy and failed to do so.” Neither applies squarely  
3 to the facts of the case-at-bar.  
4

5 *In re Coastal Plains* involved a corporate debtor, which itself is arguably  
6 enough of a distinction to render the case irrelevant. *In re Coastal Plains, Inc.*,  
7 179 F.3d 197 (C.A.5 1999). The debtor in *Coastal Plains* had failed to list the  
8 claim in question there (for breach of contract and return of assets) in the original  
9 petition, but additionally failed to disclose it in a list of assets submitted in a  
10 motion for relief from the automatic stay which resulted in the stay being lifted  
11 for a particular creditor. *Id.* at 202-203. For the court, the fact that relief was  
12 given from the automatic stay based on the representation that the Plaintiff had no  
13 claims against Defendant meant that the bankruptcy court had “accepted” the  
14 statement that the debtor did not have any claims. *Id.* at 210. The court held that  
15 the previous statement barred the future claim that had not been disclosed. *Id.* at  
16 213. In making this determination, however, the Court noted that judicial  
17 *estoppel* would not have been appropriate if the debtor had lacked knowledge for  
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27 Plaintiff has amended her bankruptcy schedules to add her FDCPA claim, and therefore  
28 Defendant’s Motion should be denied.

Response to Defendant’s Motion for Summary Judgment - 8

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1 the undisclosed claims or if they had had no motive for the concealment. *Id* at  
2 210.

3  
4 *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d  
5 Cir. 1988), meanwhile, is almost entirely irrelevant to the case-at-bar because it  
6 arose from a bankruptcy proceeding and was decided primarily on the basis of  
7 equitable *estoppel* and bankruptcy-specific considerations, and only gave a  
8 passing reference to Defendant's claim pursuant to judicial *estoppel*, with no  
9 discussion of any possible counter-arguments or defenses by *Oneida*. *Id*. Also,  
10 unlike the case-at-bar, *Oneida* involved a corporate bankruptcy debtor and not a  
11 consumer. *Id*.

#### 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

#### IV. CONCLUSION

Although Plaintiff initially failed to disclose her FDCPA claim in her  
bankruptcy, the omission was unintentional, was not accepted by any court  
through a final judgment, was made during an open chapter 13 case which could  
be expected to be amended at any time, and had no detrimental effect on  
Defendant's position in this proceeding. Most importantly, Plaintiff recently  
amended her chapter 13 petition to add the claim as an exempt asset in her  
bankruptcy, rendering Plaintiff's basis for its motion moot. Plaintiff therefore  
respectfully requests that Defendant's Motion be denied.

1  
2 Respectfully submitted this 2<sup>nd</sup> day of March, 2009.  
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4  
5 s/Jon N. Robbins  
6 Jon N. Robbins  
7 WEISBERG & MEYERS, LLC  
8 Attorney for Plaintiff

9 Filed electronically on this 2<sup>nd</sup> day of March, 2009, with:  
10 United States District Court CM/ECF system

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# EXHIBIT A

Response to Defendant's Motion for Summary Judgment - 11

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# EXHIBIT B

Response to Defendant's Motion for Summary Judgment - 12

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